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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 69

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,
Petitioners,

v.

JACKSONVILLE TERMINAL COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

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IN THE

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No.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,
Petitioners,

v.

JACKSONVILLE TERMINAL COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

Petitioners[1] pray that a Writ of Certiorari issue to review the judgment of The District Court of Appeal, First District, State of Florida, entered in this cause on July 18, 1967.

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[1] Petitioners, who were defendants in the trial court and appellants in the District Court of Appeal, First District, below are the Brotherhood of Railroad Trainmen, a labor organization, Order of Railway Conductors and Brakemen, a labor organization, Brotherhood of Locomotive Firemen and Enginemen, a labor organization, Ray Moore, an individual, Lowell Kennedy, an individual, and T. C. Bolin, an individual.

CITATIONS TO OPINIONS BELOW

The opinion and judgment of the District Court of Appeal, First District, State of Florida, dated July 18, 1967, and here sought to be reviewed, is printed in Appendix B hereto and is reported at 201 So. 2d 253. The Final Decree of the Florida Circuit Court of the Fourth Judicial Circuit, In and For Duval County, Florida, dated July 29, 1966, which was affirmed by the judgment here sought to be reviewed, is printed in Appendix A hereto and is not reported. The Order of the Supreme Court of Florida, dated November 7, 1967, dismissing an appeal from the judgment of the District Court of Appeal, First District, State of Florida, is printed in Appendix C hereto, and is reported at 207 So. 2d 458. The Order of the Supreme Court of Florida dated January 30, 1968, denying a Petition for a Writ of Certiorari to review the judgment of the District Court of Appeal, First District, State of Florida, is printed in Appendix D hereto and has not yet been reported, — So. 2d —.

The opinions and judgments in companion cases arising out of the identical facts and conduct here involved, including the judgment of this Court in *Atlantic Coast Line R. Co.* v. *Brotherhood of R. Trainmen,* 385 U.S. 20 (1966), affirming by an equally divided Court the judgment of the United States Court of Appeals for the Fifth Circuit in *Brotherhood of R. Trainmen* v. *Atlantic Coast Line R. Co.*, 362 F. 2d 649 (5 Cir. 1966), are set forth in Appendices E-I hereto.

JURISDICTION

The judgment of the District Court of Appeal, First District, State of Florida, was rendered on July 18, 1967. Thereafter, in an effort to exhaust all possible state-court remedies, petitioners timely filed both an

appeal from the judgment to the Florida Supreme Court and a petition for a writ of certiorari to the Florida Supreme Court seeking review of the District Court of Appeal, First District's judgment. The Florida Supreme Court dismissed the appeal on November 7, 1967, without opinion, 207 So. 2d 458 (Appendix C hereto), and denied the petition for a writ of certiorari on January 30, 1967, So. 2d (Appendix D hereto).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

In the trial court, i.e., the Florida Circuit Court of the Fourth Judicial Circuit, petitioners expressly asserted in their answer and throughout the trial that rights, privileges and immunities under the United States Constitution and federal statutes precluded application of Florida statutes and common law to petitioners' conduct which respondent sought to enjoin solely on the ground that such conduct was in violation of Florida law. The trial court over-ruled petitioners' contentions in this regard and enjoined petitioners' conduct as being in violation of several Florida statutes and also Florida common law. On appeal to the Florida District Court of Appeal, First District, that Court affirmed in a per curiam decision holding that "* * * the trial court exercised a proper authority in enjoining a violation of a valid state statute * * *." 201 So. 2d at 254; Appendix B hereto, p. 8a. Which of several Florida statutes relied upon by the trial court was thereby referred to by the District Court of Appeal, First District, does not appear and cannot be ascertained. Nevertheless the decision of the District Court of Appeal, First District, did sustain the validity of some Florida statute after the question of the validity

of any Florida statute as applied to petitioners' conduct was raised on the basis of repugnancy to the federal Constitution and federal laws. Hence an appeal to this Court might well lie under 28 U.S.C. 1257(2); however, petitioners have elected to invoke this Court's broader, albeit discretionary, jurisdictional powers under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Where employees of an interstate railroad carrier are engaged in a lawful strike arising out of a "major dispute" under the Railway Labor Act, 45 U.S.C. 151-163, does federal or state law govern the legality of peaceful and orderly picketing carried on by the striking employees and their unions against the operations of the struck carrier on premises of a Terminal Company which is jointly owned and controlled by the struck carrier with other interstate carriers under a joint venture agreement executed pursuant to Interstate Commerce Commission approval, which agreement grants to each carrier the equal right to the use of all Terminal Company premises in common, and on which premises the struck carrier regularly carries on its business, operates its trains, deals with the public, receives the labor services of the Terminal Company's employees, maintains its equipment, and receives and makes deliveries of goods and cars?

2. Under the circumstances set forth in Question 1, may a state court apply exclusively local state law to prohibit concerted, peaceful, orderly labor activity of the striking railroad employees and their unions without regard for the provisions of numerous federal statutes (e.g., the Railway Labor Act, 45 U.S.C. 151-163; the Clayton Act, 15 U.S.C. 17, 29 U.S.C. 52; and

the Norris-LaGuardia Act, 29 U.S.C. 101 *et seq.*) regulating interstate railway labor disputes and despite the provisions of the Commerce Clause and the Supremacy Clause of the United States Constitution to the contrary?

3. Under the circumstances set forth in Question 1, is the peaceful and orderly picketing of the striking railroad employees and their unions lawful concerted labor activity under controlling federal law?

4. Under the circumstances set forth in Question 1, do the provisions of the Norris-LaGuardia Act, 29 U.S.C. 101 *et seq.*, apply to a state court whose jurisdiction is invoked to adjudicate the legality of the peaceful and orderly picketing conducted by lawfully striking railroad employees and their unions seeking to exercise their right of "self help" in a "major dispute" arising under the Railway Labor Act, 45 U.S.C. 151 *et seq.*?

5. Under the circumstances set forth in Question 1, is the peaceful and orderly picketing the kind of labor conduct which is "arguably subject" to the jurisdiction of the National Labor Relations Board under the National Labor Relations Act, 29 U.S.C. 141 *et seq.*, where the picketing union is a "labor organization" within the literal definition of the National Labor Relations Act, 29 U.S.C. 152 (5); where the conduct is challenged by the Terminal Company as constituting an illegal secondary boycott, which is labor conduct prohibited by the National Labor Relations Act, 29 U.S.C. 158(b)(4); and where the picketing affects interstate commerce in an amount clearly exceeding the NLRB's minimal jurisdictional limits as to economic impact on interstate commerce? If so, does a state court have jurisdic-

tion to make the initial adjudication of the legality of such challenged labor conduct under the rule of exclusive primary jurisdiction set forth in *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959)?

6. Under the First and Fourteenth Amendments to the United States Constitution, may a State which does not ban all peaceful and orderly picketing on its public streets and in fact permits peaceful picketing which is not "beyond the area of the industry within which a labor dispute arises" (Section 447.09(12), Florida Statutes, 1965 and 1967, 15 F.S.A. 447.09(12)), apply a different and more restrictive rule to railroad workingmen so as to limit their right of free communication by peaceful picketing to their employer and persons directly employed by such employer, while forbidding such communication to other railroad workers engaged in the same industry who perform labor services for the employer or who make deliveries to, or receive deliveries from, the employer?

7. Under the First and Fourteenth Amendments to the United States Constitution, may a State prohibit peaceful and orderly picketing on the public streets of a city where the picketing does not interfere in any way with the regular use of the streets for the purpose of carrying traffic and where the only effect of the picketing is to cause some of the people who see and read the message on the picket signs to respond voluntarily to such message in an orderly fashion by refusing to cross the picket line?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following Constitutional provisions and statutes are involved, and being lengthy, are set forth in the Appendix hereto:

1. The Commerce Clause, Article I, Section 8, Constitution of the United States (Appendix J hereto, p. 39a).

2. The Supremacy Clause, Article VI, Paragraph 2, Constitution of the United States (Appendix J hereto, p. 39a).

3. The First Amendment, Constitution of the United States (Appendix J hereto, p. 39a).

4. The Fourteenth Amendment, Constitution of the United States (Appendix J hereto, p. 39a).

5. The Railway Labor Act, 44 Stat. 577 (1926), as amended, 45 U.S.C. 151 *et seq.* (Appendix K hereto, p. 40a).

6. The Norris-LaGuardia Act, 47 Stat. 70 (1932), as amended, 29 U.S.C. 101 *et seq.* (Appendix L hereto, p. 74a).

7. Sections 6 and 20 of the Clayton Act, 38 Stat. 731, 738 (1914), 15 U.S.C. 17, 29 U.S.C. 52 (Appendix M hereto, p. 81a).

8. Sections 2 and 8(b)(4) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 61 Stat. 140 (1947), as amended, 29 U.S.C. 152 and 158(b)(4) (Appendix N hereto, p. 83a).

9. The Florida Transportation Act, Chapter 351, Florida Statutes, 1965 and 1967, 13A F.S.A. 351.01-351.30 (Appendix O hereto, p. 88a).

10. The Florida Restraint of Trade Laws, Chapter 542, Florida Statutes, 1965 and 1967, 16 F.S.A. 542.01-542.12 (Appendix P hereto, p. 101a).

11. The Florida Labor Relations Law, Chapter 447, Florida Statutes, 1965 and 1967, 15 F.S.A. 447.01-447.16 (Appendix Q hereto, p. 108a).

STATEMENT OF THE CASE

This case is a sequel to the one decided by this Court by an equally divided vote in *Atlantic Coast Line R. Co.* v. *Brotherhood of R. Trainmen,* 385 U.S. 20 (1966), affirming *Brotherhood of R. Trainmen* v. *Atlantic Coast Line R. Co.,* 362 F. 2d 649 (5th Cir. 1966), and arises out of the identical fact situation.

The Florida East Coast Railway Company (hereinafter called FEC) has been involved in a strike with its nonoperating employees since January, 1963. See *Brotherhood of Ry. Clerks* v. *Florida East Coast R. Co.,* 384 U.S. 238 (1966). During the course of this strike, which still continues, the FEC served proposals on the unions representing its operating employees seeking to abolish their existing collective bargaining contracts and substitute therefor a so-called "Uniform Working Agreement" which altered rates of pay, rules, and working conditions across the board in ways deemed highly detrimental by the operating unions.

The FEC at first implemented its proposed changes without following the procedures of the Railway Labor Act, contrary to the prohibitions of Section 2, Seventh, and Section 6 of that Act, 45 U.S.C. 152, Seventh, and 156. See, e.g., *United States* v. *Florida East Coast R. Co.,* 221 F. Supp. 325 (D.C. D.C. 1963); *United States* v. *Florida East Coast R. Co.,* 55 LRRM 2798

(M.D. Fla. 1964); *Florida East Coast R. Co.* v. *Brotherhood of R. Trainmen,* 336 F. 2d 172, cert. den., 379 U.S. 990; *Florida East Coast R. Co.* v. *Brotherhood of Loc. Eng., Order of Railroad Conductors & Brakemen, and Brotherhood of Locomotive Firemen and Enginemen,* 362 F. 2d 482 (5th Cir. 1966).

Eventually barred from such action by the decisions and injunctions in the above cases, FEC restored the previously existing contract conditions and awaited release of its proposals by the National Mediation Board under the procedure of the Railway Labor Act. The National Mediation Board released the proposals from mediation and proffered arbitration to the parties in March, 1966.

The FEC quickly declined the proffer of arbitration, and thirty days later, on April 24, 1966, unilaterally implemented its proposals for the crafts of trainmen and yardmen (represented by the Brotherhood of Railroad Trainmen, or BRT), conductors (represented by the Order of Railway Conductors and Brakemen, or ORC&B) and hostlers (represented by the Brotherhood of Locomotive Firemen and Enginemen, or BLF&E). In response these three unions, petitioners here, went on strike. Ten days later on May 4, 1966, the BRT commenced the peaceful and orderly picketing here involved.

Within hours from the commencement of the picketing, the respondent Terminal Company and two of its joint owners, the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railroad Company, sought and obtained a temporary restraining order from the United States District Court for the Middle District of Florida, Jacksonville Division, prohibiting

petitioners from all picketing of the premises of the respondent Terminal Company except for a so-called "reserved gate" which had been labeled since 1963 for the exclusive use of employees of the FEC who reported to work on Terminal Company premises by foot. The U. S. District Court thereafter converted its TRO into a preliminary injunction. An appeal followed promptly to the U. S. Court of Appeals for the Fifth Circuit. Effective May 24, 1966, the U. S. Court of Appeals reversed and vacated the preliminary injunction on the ground that the U. S. District Court was barred from issuing it by the provisions of the Norris-LaGuardia Act, 29 U.S.C. 101 *et seq. Brotherhood of R. Trainmen* v. *Atlantic Coast Line R. Co.*, 362 F. 2d 649 (5th Cir. 1966).

At this point petitioners were free from any court restraint against resuming their challenged picketing conduct. However, on May 25, 1966, the respondent Terminal Company and its co-plaintiffs filed an "Application for an Order Staying Proceedings, etc." with this Court and petitioners refrained from reinstating the picket lines pending consideration of that Application pursuant to oral assurance given by petitioners' counsel to the Chief Deputy Clerk of this Court. By Order dated June 6, 1966, this Court granted the Application conditioned on expedited filing of a petition for a writ of certiorari, 384 U.S. 967, and thereafter on June 20, 1966, this Court granted certiorari and set the case for oral argument during the week of October 10, 1966. 384 U.S. 1000.

Meanwhile, respondent Terminal Company instituted the instant case in the Florida State trial court of general jurisdiction in Jacksonville, Florida, on May 23, 1966, seeking an injunction against the identical

conduct involved in the pending federal court case on the asserted basis that petitioners' conduct was in violation of the laws of Florida (Complaint for Injunction and Amended Complaint for Injunction, Record, Vol. I, pp. 1-31). Petitioners promptly removed the case on May 24, 1966, to the U. S. District Court, Middle District of Florida (Record, Vol. I, pp. 16-20), but that Court equally promptly remanded the case to the Florida State court on May 26, 1966 (Record, Vol. I, p. 24). Petitioners filed their answer in the State court on May 27, 1966, expressly asserting each and all of the federal questions here presented as defenses (Record, Vol. I, pp. 32-37), and the case came on for hearing on the Terminal Company's application for a temporary injunction, which was granted by Order dated May 30, 1966, in terms substantially the same as those in the preliminary injunction of the U. S. District Court in the federal case (which was reinstated by Order of this Court a few days later on June 6, 1966, as described above).

On June 3, 1966, petitioners filed a Suggestion for Writ of Prohibition in the Florida District Court of Appeal, First District, *Brotherhood of R. Trainmen* v. *Hon. Roger J. Waybright,* Case No. I-7, seeking a writ of prohibition against maintenance of the State trial court proceedings on the ground that the labor conduct involved was "arguably subject" to the exclusive, primary jurisdiction of the National Labor Relations Board and that the trial court below therefore lacked jurisdiction to hear or adjudicate the case. The Suggestion was heard June 7, 1966, and denied by an unreported, per curiam Order dated June 8, 1966 (Appendix E hereto, p. 11a). A petition for a writ of certiorari filed with this Court on June 17, 1966, to

review the Order of June 8, 1966, of the Florida District Court of Appeal, First District, denying that Suggestion for Writ of Prohibition (Case No. 1426, O.T. 1965; Case No. 244, O.T. 1966)[2] was denied by this Court on November 7, 1966. 385 U.S. 935; Appendix F hereto, p. 12a. Respondent Terminal Company, it should be noted, opposed the petition on the grounds, inter alia, that the Order of the Florida District Court of Appeal, First District, denying the Suggestion for Writ of Prohibition was based on independent, adequate state grounds (i.e., prohibition was not a proper remedy), was essentially interlocutory rather than final, and was not clearly from the highest court of the state in which a decision could be had. See Brief in Opposition, No. 244, O.T. 1966, pp. 7-13.

Meanwhile, the Florida trial court in this case proceeded to a final hearing in this case in July, 1966, and rendered its Final Decree herein (Appendix A hereto, p. 1a) dated July 29, 1966, over-ruling all of petitioners' defenses, including all of the federal questions raised herein, and permanently enjoining petitioners from picketing the premises of the respondent Terminal Company except at the so-called "reserved gate" set aside for use of FEC employees entering the premises on foot to begin their work day.

Petitioners appealed to the Florida District Court of Appeal, First District, seeking reversal of the Final Decree on all the grounds here asserted. The District

[2] The Complaint and attached affidavits, the amended Complaint, the answer, and the Order for Preliminary Injunction of the Florida trial court in this case are printed in the separately-bound Appendix to the petition for a writ of certiorari in that case, *Brotherhood of R. Trainmen* v. *Jacksonville Terminal Co.*, No. 244, O.T. 1966; cert. den., 385 U.S. 935.

Court of Appeal heard oral argument on March 30, 1967, and thereafter by per curiam opinion filed July 18, 1967 (Appendix B hereto, p. 2a; 201 S. 2d 253), affirmed the Final Decree on the basis that the question of the trial court's jurisdiction had been determined "for all practical purposes" by the prohibition and removal proceedings in favor of the State trial court's possessing jurisdiction, and on the basis that "* * * the trial court exercised a proper authority in enjoining a violation of a valid state statute * * *."

In an effort to exhaust all possible state court remedies, petitioners filed a timely appeal from the judgment of the District Court of Appeal, First District, to the Florida Supreme Court, and simultaneously filed a timely petition for a writ of certiorari with the Florida Supreme Court seeking review of such judgment. The appeal, however, was dismissed by Order of the Florida Supreme Court dated November 7, 1967 (Appendix C hereto, p. 9a; 207 So. 2d 458), and the petition for certiorari was denied on January 30, 1968 (Appendix D hereto, p. 10a).

STATEMENT OF THE FACTS

Since the conduct involved in this case is the identical conduct involved in *Atlantic Coast Line R. Co.* v. *Brotherhood of R. Trainmen,* 385 U.S. 20 (1966), the factual situation has already been extensively presented to this Court in the briefs and oral argument of that case. However, in short form, and in terms of the evidence and findings in this case, the factual situation here involved is as follows:

The Jacksonville Terminal Company is a Florida corporation which is owned and controlled by four interstate railroad carriers, the FEC, the Atlantic

Coast Line R. Co., the Seaboard Air Line R. Co., and the Southern Railway System. It operates a passenger and freight rail terminal facility in Jacksonville, Florida, which constitutes the connecting link between the FEC and the other carriers. The Terminal Company and its owners are all interstate carriers by rail certificated by the Interstate Commerce Commission and covered by the Railway Labor Act.

Pursuant to a special joint venture agreement entered into by the four owners of the Terminal Company with the approval of the Interstate Commerce Commission, each of the owning railroads, including the FEC, is granted an equal right to use in common all of the passenger and freight facilities of the Terminal Company (Defs'. Exh. 1, Record, Vol. I, pp. 59-67; Defs'. Exh. 2 at hearing of 7/29/66, Record, Vol. II, pp. 147-184). Likewise the joint venture agreement contains numerous provisions which give each owning railroad, including the FEC, effective control over the Terminal Company's operations by giving each railroad a veto power, for example, or by requiring unanimous consent of all for policy decisions (Defs'. Exh. 2 at hearing of 7/29/66, Record, Vol. II, pp. 147-184). See *Jacksonville Terminal Co.* v. *Florida East Coast Ry. Co.*, 363 F. 2d 216 (5th Cir. 1966), cert. den., 385 U.S. 950 (1966), for a more extensive description of the joint venture agreement, or Operating and Guaranty Agreement as it is formally called, which was described by the Court in that case to be "* * * indeed most unusual." 363 F. 2d at 217.

Exercising its rights under this joint venture agreement, the FEC daily and regularly carries on its business on the Terminal Company premises, operates its trains over Terminal Company tracks, deals with the

public from Terminal Company facilities, maintains and repairs its engines and cars in Terminal Company shops, receives labor services performed for it by Terminal Company employees,[8] and receives and makes deliveries of goods and cars on and by use of Terminal Company premises and facilities (Record, Vol. IV, especially pp. 48-50; Vol. III, and Vol. V). In short, the Terminal Company premises and facilities are an integral and essential part of FEC's system without which the FEC would be virtually reduced to the status of an intrastate railroad.

On May 4, 1966, after going on strike against the FEC, the Brotherhood of Railroad Trainmen (BRT) began picketing the various foot, road, and rail entrances to the Jacksonville Terminal Company premises which were used either by FEC employees or by Terminal Company employees who regularly performed labor services for the FEC or by railroad employees of connecting carriers to make deliveries to, or take deliveries from, the struck FEC. The picket signs were addressed only to "Fellow Railroad Men," advised them that the B. of R. T. was on legal strike against the FEC, and requested them not to cross or assist FEC and to "please make common cause with us in major dispute against FEC." (See Pls'. Exh. 2-20, Record, Vol. I, pp. 77-95).

The picketing was entirely peaceful and orderly and did not physically disrupt or interfere with traffic of

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[8] For example, the President and General Manager of the Jacksonville Terminal Company formally advised a union official on January 29, 1963, that: "Jacksonville Terminal Company employees represented by the Order of Railroad Telegraphers are expected to perform service for the Florida East Coast Railway Company in line with their previously assigned duties * * *." (Exh. to Stipulation, Record, Vol. II, p. 130.)

any sort.[4] It was conducted entirely on public property and as close as possible without trespassing to the physical locations where work was being performed for the FEC or deliveries were being made to or from the FEC, that is, to the place where actual and regular operations of the FEC were being carried on.

The picketing continued only for a few hours when upon it was restrained by the federal court TRO. Nevertheless, even during that short period the BRT made efforts not to stop the movement of trains that were not making deliveries to or from the FEC (see transcript of proceedings of Sat. afternoon, 5/28/66, p. 120, Record, Vol. III).

As to the status of petitioner labor organizations,[5] it was shown by stipulation that while each is predominantly composed of railroad employees employed by carriers subject to the Railway Labor Act, each also does represent some non-railroad employees of employers not subject to the Railway Labor Act. For example, the BRT represents some bus drivers and

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[4] Paragraph 8 of the Final Decree in this case (Appendix A hereto, p. 4a) expressly states: "The decision of this Court is not made upon the basis of violence. There is no evidence in the record of any violence or threat of violence involved in the picketing."

[5] Only the BRT actually picketed the Terminal Company premises. However, the Order of Railway Conductors and Brakemen (ORC&B) and the Brotherhood of Locomotive Firemen and Enginemen (BLF&E) were included in the temporary and permanent injunction as being "in active concert" with the BRT. While there was some evidence of this in the record, such evidence clearly did not meet the requirements of Section 6 of the Norris-LaGuardia Act, 29 U.S.C. 106, Appendix L hereto, pp. 76a-77a, which requires "• • • clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

approximately 7% of its members and persons represented by it are employees of employers not covered by the Railway Labor Act (See Stipulation, Record, Vol. II, p. 124-127; Defs'. Exh. 1 at hearing of July 29, 1966, Record, Vol. II, p. 146—BRT constitution).

In regard to the "reserved gate" which the Terminal Company had posted in 1963 for the exclusive use of FEC employees who report to work on Terminal Company premises to begin their work day, the parties stipulated that its posted restrictions had not uniformly been honered and that the Terminal Company had not policed its enforcement (Stipulation, Record, Vol. II, pp. 124-127).

The effect of the picketing on interstate commerce was found by the trial court to constitute an "economic strangulation of the entire state" (Final Decree, Appendix A hereto, p. 4a). Be that as it may, the picketing clearly affected commerce in an amount well in excess of the jurisdictional standards of the National Labor Relations Board.

ARGUMENT AND REASONS FOR ALLOWANCE OF THE WRIT

The basic question presented by this case is what law—state or federal—governs the legality of peaceful, orderly concerted labor conduct engaged in by striking railroad employees and their unions in a major dispute arising under the Railway Labor Act, 45 U.S.C. 151 *et seq.*? Obviously this is a question of great importance to the entire railroad industy. It has never been directly decided by this Court and should be.

This case graphically illustrates the confusion, the delay, and the unseemly competition between state and

federal courts that result from the present unsettled state of the law. Thus, while litigation was raging in the federal court system over the enjoinability of the very labor conduct here involved—with a federal court injunction that regulated such conduct being imposed, vacated, reimposed and finally vacated again—the state courts in this case were simultaneously proceeding to regulate the identical conduct by application of purely state law through injunctions against the identical parties bound by the federal court orders. The opportunity for havoc in such circumstances is plain. See *Capital Service* v. *National Labor Relations Board,* 347 U.S. 501 (1954).

But it is not only the unseemly conflict between dual systems that requires authoritative review and decision of this case. Labor unions have come a long way since the days of the Brandeis-Gompers debate at Tremont Temple, Boston, in 1902. Since then, as Mr. Brandeis then urged,* the practical immunity of labor unions from suit or legal liability has been stripped from them. Unions today are easily suable, economically responsible entities. But there is no chart by which responsible unions can choose their course without the risk of incurring ruinous financial liability. And if the decision of the Court below in this case stands, the president of any national railroad union will have to consult with counsel in a multitude of different

*Mr. Brandeis then argued: "The practical immunity of the labor unions from suit or legal liability is, in my opinion, largely responsible for the existence of the greatest grievances which labor unions consider they have suffered at the hands of courts, that is, so-called government by injunction." Mason, *Brandeis: A Free Man's Life* (1946), p. 143. Mr. Brandeis' prediction at that time that elimination of the immunity would also eliminate the use of labor injunctions, however, remains debatable today.

states and the District of Columbia before making a move which may well be permissible in one place, required in another, and prohibited in a third, all on the same interstate railroad system. Certainly this was not the intent of Congress nor is it compatible with the Commerce Clause and the Supremacy Clause of the United States Constitution.

Petitioners respectfully submit that the decision of the District Court of Appeal below is clearly wrong in upholding the application of exclusively Florida law to the concerted labor conduct here involved. It is difficult to imagine a field in which federal interest and regulation are more pervasive and all encompassing than the operations and labor relations of interstate carriers by rail. Federal statutory regulation in the area of railroad employee relations alone is sweeping:

1. The Railway Labor Act, 45 U.S.C. 151 *et seq.*
2. The Clayton Act, 38 Stat. 730, 15 U.S.C. 17, 29 U.S.C. 52.
3. The Norris-LaGuardia Act, 29 U.S.C. 101 *et seq.*
4. The Railroad Retirement Act, 45 U.S.C. 228 *et seq.*
5. The Federal Employers Liability Act, 45 U.S.C. 51 *et seq.*
6. The Railroad Unemployment Insurance Act, 45 U.S.C. 351 *et seq.*
7. The Fair Labor Standards Act, 29 U.S.C. 216 *et seq.*
8. The Safety Appliance Act, 45 U.S.C. 1 *et seq.*
9. The Boiler Inspection Act, 45 U.S.C. 22 *et seq.*
10. The Hours of Service Act, 45 U.S.C. 61 *et seq.*

Hardly a term of Congress goes by without Congressional attention to the field of railway labor relations. Surely in this area, perhaps more completely than in any other, the tests for determination of whether federal law occupies the field to the exclusion of state regulation are met. As stated by this Court in *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) the tests are:

> "The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co.* v. *Public Service Commission*, 250, U.S. 566 * * *. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines* v. *Davidowitz*, 312 U.S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purposes. *Southern R. Co.* v. *Railroad Commission*, 236 U.S. 439 * * *. Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill* v. *Florida*, 325 U.S. 538 * * *."

Petitioners submit that just as state courts must apply federal law in adjudicating disputes arising under the Federal Employers Liability Act, so also the economic self-help rights of employees subject to the Railway Labor Act must be determined by federal law regardless of the forum. See *Mondou* v. *New York, N. H. & H. R. R. Co.*, 223 U. S. 1 (1911); *Wabash R. Co.* v. *Hayes*, 234 U. S. 86 (1914).

Just as the requirements of uniformity compel the application of federal law to labor contracts, whether negotiated under the National Labor Relations Act or the Railway Labor Act, *International Ass'n of Ma-*

chinists v. *Central Airlines*, 372 U. S. 682 (1963); *Textile Workers Union of America* v. *Lincoln Mills*, 353 U.S. 448 (1957); *Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225 (1956), so likewise should federal law be applied to determine the permissible scope of self-help under the Railway Labor Act, absent violence or interference with a State's prime responsibility to maintain peace and order. This Court has just recently defined the scope of railroad management's right to self-help under strike conditions according to Federal law in *Brotherhood of Ry. Clerks* v. *Florida East Coast Ry. Co.*, 384 U.S. 238 (1966). Can it be seriously contended that railway labor's comparable rights are determined by the application of fifty different state notions of proper labor policy? If so, then the balance of power struck by Congress between competing economic interests will be constantly out of kilter. Here, for example, the state trial court below entered its injunction not at all based on federal law, nor even on Florida's statutory labor law,[7] but rather on broad business regulatory statutes (i.e., the Florida Restraint of Trade Laws and the Florida Transportation Act, Appendices Q & P hereto, pp. 101a, 88a) which any strike, picketing, or work stoppage whatsoever in the railroad industry would violate, if applicable. Compare *Teamsters Local 24* v. *Oliver*, 358 U.S. 283 (1959);

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[7] The Florida legislature, in passing a general law regulating labor union activity, expressly recognized federal preemption in the railway labor field and provided in Section 447.15 thereof that: "Federal regulations recognized.—All railway labor organizations and members thereof shall be exempt from all of the provisions of this chapter as long as they are regulated by act of congress." Section 447.15, Florida Statutes, 1965 and 1967, 15 F.S.A. 447.15; Appendix Q hereto, p. 115a. See also Section 453.16, Florida Statutes, 1965 and 1967, 15 F.S.A. 453.16, exempting any utility to which the national Railway Labor Act is applicable from the Florida Public Utility Arbitration Law.

see *Collective Bargaining Agreements and State Antitrust Immunity*, 77 Yale L. J. 789 (1968).

Even such a strong state policy as one forbidding state employees from striking against, or engaging in collective bargaining with the state as their employer must yield to the national labor policy where the Railway Labor Act applies. *California* v. *Taylor*, 353 U.S. 553 (1957);[8] cf. *Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225 (1956).

Perhaps the most striking anomaly resulting from the decision here involved arises from its conflict with the decision of the U. S. Court of Appeals for the Fifth Circuit in *Jacksonville Terminal Co.* v. *Florida East Coast Ry. Co.*, 363 F.2d 216 (5th Cir. 1966), cert. den., 385 U.S. 950 (1966), where it was held that even the internal corporate affairs of respondent, a Florida corporation, are governed by federal, not state, standards since respondent is "an important instrumentality of interstate commerce" and "an essential link in movements of equipment and freight to and from distant points on this web of interstate rails." 363 F.2d at 219. Yet it is respondent that here seeks application of purely local state law against petitioners for interfering by peaceful conduct with its function as an instrumentality of interstate commerce and as an essential link in a web of interstate rails.

In summary, petitioners suggest that here, as in *Teamsters Union* v. *Morton*, 377 U. S. 252, 261 (1964),

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[8] See Brief for Appellant State of Texas in No. 742, O.T. 1967, *Maryland* v. *Wirtz*, p. 18, where the State of Texas refers to the decision in *California* v. *Taylor*, supra, and concedes that application of the Railway Labor Act "• • • to the states had no destructive effect on the states."

the subject matter of this case is one where "* * * the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law." See also *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). This Court should grant the petition for a writ of certiorari to review and correct the decision rendered below to the contrary.

In addition to the threshold question of what law here applies, other questions are necessarily presented in this case which independently warrant review by this Court. These are as follows:

1. *Application of Norris-LaGuardia Act to state courts applying federal labor law.* As this Court noted in *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 514, n. 8 (1962):

> "The relation of the Norris-LaGuardia Act to state courts applying federal labor law has never been decided by this Court."

The recent case of *Avco Corporation* v. *Aero Lodge No. 735*, No. 445, O.T. 1967, decided April 8, 1968, — U.S. —, 36 L.W. 4288 similarly noted the question but did not resolve it since that case had been removed to a federal court.

Lower federal courts, however, have considered the question (usually in a removal context) with conflicting results. Compare the U. S. Court of Appeals for the Sixth Circuit's opinion in the *Avco Corporation* case, 376 F.2d 337, 343, with *American Dredging Co.* v. *Local 25*, 338 F.2d 807 (3rd Cir. 1964), cert. den., 380 U.S. 935 (1965).

The question is here presented not only in terms of whether the state court below had jurisdiction to issue the injunction here involved, but also in terms of the degree of proof required in order to hold a labor union responsible for the acts of others under Section 6 of Norris-LaGuardia, 29 U.S.C. 106. See *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 735-742. Here the ORC&B and BLF&E did not engage in the challenged picketing. But their representatives did attend certain meetings at which the BRT announced its plans to picket, and the picket signs had originally been printed with the BLF&E and ORC&B initials on them, which initials had thereafter been blocked out. Obviously at one time the three unions had planned to picket together; obviously those plans got changed before the picketing commenced. Is this the sort of "clear proof of actual participation in, or actual authorization of * * * or of ratification of such acts after actual knowledge thereof" required by Section 6 of Norris-La Guardia? Petitioners submit it is not, and that if Norris-LaGuardia does here apply, the Final Decree's permanent injunction against the ORC&B and BLF&E must be reversed for this reason alone.

Similarly, this Court has held that under Section 8 of Norris-LaGuardia, 29 U.S.C. 108, a party to a railroad labor dispute, who declines to accept voluntary arbitration as a means of settlement of the dispute, is not entitled thereafter to the affirmative aid of a court of equity in regard to such railroad labor dispute. *Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U.S. 50 (1944); see *Brotherhood of Railway Clerks* v. *Florida East Coast R. Co.*, 284 U.S. 238, 247, n. 8. Petitioners submit that this is and should be, a substantive rule of equity applicable to interstate railroad labor disputes, regard-

less of forum. To hold otherwise is to permit the doctrine of "unclean hands" to mean one thing in one court, and another thing in another court, where the identical dispute is involved. This is to invite a mockery of the law.

The entire question of whether Norris-LaGuardia applies to state courts adjudicating labor cases controlled by federal law is one of increasing significance in the administration of both the National Labor Relations Act and the Railway Labor Act. It is one which should be resolved by this Court, hopefully, petitioners suggest, in favor of uniformity regardless of the forum involved. Both the literal language of the Norris-LaGuardia Act and the Supremacy Clause of the U.S. Constitution support such a holding. Thus, the Norris-LaGuardia Act used the term "court of the United States" to describe its coverage and expressly defines that term in Section 13 (d) as follows:

> "The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia."

There can be no doubt that state courts are literally included within this definition. Just to give one obvious example, state court jurisdiction has been limited and defined, and indeed precluded under the National Labor Relations Act in the area where the jurisdiction of the National Labor Relations Board is arguably applicable. *Garner* v. *Teamsters Union,* 346 U.S. 485 (1953); *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959). The fields of trademarks, patents and federal anti-trust are other examples where Congress has defined or limited state court jurisdiction over

federal question cases. And certainly state courts are courts of the United States when they do adjudicate a case controlled by federal law. The Supremacy Clause makes them so. Indeed for the first century of this country's history it was only state courts that enjoyed general federal question jurisdiction.

For the foregoing reasons petitioners believe that this state court case clearly warrants review by this Court to resolve the question, here squarely presented, of the application of Norris-LaGuardia to a state court adjudicating a railway labor case controlled by federal law.

2. *Is state court jurisdiction in this case ousted by the exclusive primary jurisdiction of the National Labor Relations Board under San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959)?

The *Garmon* case and its many progeny establish that both state and federal courts lack jurisdiction to adjudicate the legality of peaceful, orderly picketing which is "arguably subject" to the prohibitions of the National Labor Relations Act, as amended, 29 U.S.C. 141 *et seq.*

Petitioners respectfully submit that the decisions of the state courts below are in conflict with the decisions of this Court in *Garmon* and more particularly in *Local Union No. 25* v. *New York, New Haven and Hartford R. Co.,* 350 U.S. 155 (1956), and *Marine Engineers Benevolent Ass'n* v. *Interlake Steamship Co.,* 370 U.S. 173 (1962), and with the decision of the U. S. Court of Appeals in *International Bro. of Elect. Wkrs.* v. *NLRB,* 350 F.2d 791 (D.C. Cir. 1965), cert. den., 383 U.S. 943 (1966), a companion case also arising out of the FEC's labor difficulties. This conflict should be resolved by this Court.

The argument that the labor conduct here involved is "arguably" subject to NLRB jurisdiction is a simple one. Respondent Terminal Company is a railroad carrier which claims that petitioner labor organizations are engaging in a secondary boycott against it. Clearly the fact that respondent, as a railroad carrier, is not an "employer" within the meaning of the National Labor Relations Act, 29 U.S.C. 152 (2), does not preclude NLRB jurisdiction. *Local Union No. 25* v. *New York, New Haven & Hartford R. Co.*, supra. Equally clear, the type of alleged labor conduct, a secondary boycott, is conduct which is prohibited by the N.L.R.A., 29 U.S.C. 158 (b) (4). The question, then, is whether petitioners' status as railway labor organizations representing striking railroad employees so clearly precludes NLRB jurisdiction as to make the matter beyond argument. Petitioners, candidly, would have thought so prior to the decision in *International Bro. of Elect. Wkrs.* v. *NLRB*, 350 F.2d 791 (D.C. Cir. 1965), cert. den., 383 U.S. 943. That case involved eleven of the non-operating railway unions that went on strike against the FEC in 1963. Two of those unions that are composed and represent exclusively railroad employees under the Railway Labor Act were charged with engaging in secondary boycott picketing in connection with the FEC's spur track into Cape Kennedy, Florida. The U.S. Court of Appeals for the District of Columbia (Chief Judge Bazelon dissenting) sustained NLRB jurisdiction over the challenged conduct on the basis that the two picketing unions were acting as agents for the other nine non-operating unions, and these other nine unions were "mixed" unions, e.g., the International Association of Machinists, which in the course of their national activities represented both railroad and non-railroad employees. In

other words, the fact that all eleven of the non-operating unions allegedly involved in the Cape Kennedy picketing were, in so far as that picketing was concerned, representing exclusively railroad workers engaged in a strike against a railroad arising under the Railway Labor Act was deemed not to preclude NLRB jurisdiction.

Here also the picketing union (BRT), and the two other unions found to be in concert with it, are so-called "mixed" unions, i.e., in the course of their national activities they represent non-railroad as well as railroad employees. It is true that they are not so thoroughly "mixed" as were some of the nine non-operating unions that did not actually picket in the Cape Kennedy case. But the decision of this Court in *Marine Engineers Benevolent Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173 (1962), teaches that where NLRB jurisdiction turns on the status of the picketing organization, this too is a matter vested by Congress in the exclusive primary jurisdiction of the NLRB and can not be initially determined by a state court.

Respondent argued in the companion federal court case and in the writ of prohibition case that:

> "It is somewhat difficult to say that this is a matter 'arguably' subject to the jurisdiction of the NLRB when no one is willing to step forward and make any such argument."[9]

But NLRB jurisdiction is not self-activating (See *Nash* v. *Florida Industrial Commission*, — U.S. —,

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[9] Brief of Respondent Jacksonville Terminal Company in Opposition, p. 17, Case No. 244, O.T. 1966, *Bro. of R. Trainmen* v. *Jacksonville Terminal Co.*

88 S. Ct. 362, 365),[10] and it is not very difficult at all to understand why respondent, so long as it is armed with a state court injunction, does not step forward and invoke NLRB jurisdiction.

Petitioners submit that the question here involved is an important one concerning the relationship of two major federal labor statutes to each other, and the effect of such relationship on state court jurisdiction over peaceful labor conduct. The petition for a writ of certiorari should be granted in order for this Court to consider and resolve the question which clearly has national ramifications.

3. *Does the injunction of the Florida court in this case violate free speech rights protected by the First and Fourteenth Amendments to the United States Constitution?*

The State of Florida does not purport to ban all peaceful picketing or demonstrations on the public streets of its cities. Insofar as labor picketing is concerned, its general statute regulating labor union conduct specifically protects the "right of free petition, lawful assemblage and free speech" of any member of a labor organization[11] and by negative implication, at least, permits picketing within "the area of the in-

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[10] "Implementation of the Act is dependent upon the initiative of individual persons who must, as petitioner has done here, invoke its sanctions through filing an unfair labor practice charge." 88 S.Ct. at 365.

[11] Section 447.09 (1), Florida Statutes, 1965 and 1967, 15 F.S.A. 447.09 (1), Appendix Q hereto, p. 112a.

dustry within which a labor dispute arises."[12] Likewise the injunction in this case does not ban all picketing of respondent's premises for it excepts from its terms the so-called "reserved gate" which is posted for use of FEC employees only.

Considering the fact that the "reserved gate" is not for use of persons coming on the premises to do business with the FEC or to perform labor services for the FEC or to make deliveries to or take deliveries from the FEC, or even for use of all FEC employees who come on the premises in the course of their regular duties,[13] it is plain that the intent of the injunction was to limit the persons to whom petitioners could address their plea for help exclusively to those directly employed by the FEC. Petitioners respectfully submit that thereby the State of Florida is regulating not the act of picketing itself, but rather the "communication" or "speech" involved in the picketing. Indeed, respondent admitted as much in the District Court of Appeal below when it stated that the Chancellor's decree was "* * * unquestionably in regulation of speech or communications * * *."[14]

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[12] Section 447.09 (12), F.S. 1965 and 1967, 15 F.S.A. 447.09 (12), Appendix Q hereto, p. 113a: "It shall be unlawful for any person: * * * (12) To picket beyond the area of the industry within which a labor dispute arises."

[13] The gate is only "for the exclusive use and entrance of FEC employees who report to work on JTC premises to begin their work day." (Stipulation, paragraph 6, Record, Vol. II, pp. 124-127.) Obviously FEC employees entering the premises by rail or other vehicle must use other entrances.

[14] Page 44, Brief of Appellee in District Court of Appeal, First District, State of Florida. The full sentence quoted from reads as follows: "Thus the Chancellor's decree, though unquestionably in regulation of speech or communications, was not prohibited by either the United States or Florida Constitutions."

But it is clear at this time that the communication of ideas by picketing or marching on the public streets does not enjoy the same degree of protection under the First and Fourteenth Amendments as is afforded to "pure speech". As stated by Mr. Justice Goldberg, writing for the Court in *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965):

> "We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech."

Nevertheless some lesser degree of protection is afforded as the holding in the *Cox* case demonstrates. In this area of First Amendment rights, at least, the courts apparently are called upon to apply a balancing test weighing the rights of the public to enjoy unimpeded use of their public thoroughfares for carrying traffic, and to pass thereon free from the reception of unwanted exhortations, on the one hand, against the rights of persons peacefully and in an orderly manner to assemble in public places and communicate ideas, on the other. This latter right, of course, is of particular importance to minority groups and to those with grievances against majority power who lack the means to publish newspapers or own television and radio stations. See Baron, *Access to Press—A New First Amendment Right*, 80 Harvard L.R. 1641.[15] Certainly

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[15] Compare the First Amendment's counterpart in the Soviet Union's Constitution, Clause 125: "In accordance with the worker's interests and with the aim of strengthening the Socialist system, the citizens of the U.S.S.R. are guaranteed by law: A. Freedom of speech; B. Freedom of the press; C. Freedom of gath-

the recent, appalling spectacle of ghetto dwellers burning their own homes and neighborhoods in a fit of frenzy resembling a frustrated child who has not yet learned to communicate adequately by speech, suggests that the problem is very much with us today, and that the balancing task facing this Court and the Nation's judicial system is not an easy one.[16]

In this case the Florida courts have struck the balance by cutting off all communications by petitioners to fellow railroad workers who are not only employed in the same industry but who actually and regularly perform labor services for the FEC (i.e., the respondent's employees) and who regularly and daily make deliveries to and from the FEC—except for a handful of direct employees of the FEC who report to work to begin their work day on respondent's premises by foot. Petitioners submit that this is not the balance required

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erings and meetings; D. Freedom of processions and demonstrations on the streets. These rights of the citizens are secured by making available to workers and their organizations printing facilities, supplies of paper, public buildings, streets * * *." This provision was recently cited by the Russian writer, Vladimir I. Bukovsky, without success, in defending himself against criminal charges of violating, by a street demonstration, the Russian Law, Article 70, prohibiting "Agitation and propaganda conducted with the aim of subverting or weakening Soviet authority * * *." Mr. Bukovsky also relied, without success, on First Amendment decisions of this Court. See translation of letter of October 3, 1967, of Pavel M. Litvinov to newspapers in the West, New York Times, December 27, 1967, p. 20.

[16] It was, of course, the firm belief of Dr. Martin Luther King, who was assassinated while preparing to ignore a federal court order barring a 6,000 man march in Memphis, that the only constructive way to bridge the communication gap in this country between the minority confined in ghettos and the more affluent majority was by public, but peaceful, demonstrations. See New York Times, April 4, 1968, p. 30.

by the First and Fourteenth Amendments. As stated by this Court in *American Federation of Labor* v. *Swing*, 312 U.S. 321, 326 (1941):

> "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace."

This Court should grant the petition for a writ of certiorari in this case to review the action of the Florida court below in so severely restricting the exercise of First and Fourteenth Amendment rights.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted and on further hearing on the merits the decision of the District Court of Appeal, First District, in this case should be reversed and the case remanded with instructions to vacate the permanent injunction.

Respectfully submitted,

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Certificate of Service

I hereby Certify that a true copy of the foregoing Petition for a Writ of Certiorari to the District Court of Appeal, First District, State of Florida, was served this 29th day of April, 1968, by Air Mail on counsel for respondent: McCarthy, Adams & Foote, Atlantic National Bank Building, Jacksonville, Florida 32202; Rogers, Towers, Bailey, Jones & Gay, 1300 Florida Titled Building, Jacksonville, Florida 32202; and Cox & Webb, 630 American Heritage Life Building, Jacksonville, Florida 32202.

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